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IN THE
COURT OF APPEALS OF INDIANA

JASON SEXTON	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0808-CR-483
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Annie Christ-Garcia, Judge
Cause No. 49G17-0806-FD-144264

March 6, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jason Sexton appeals his conviction for Intimidation, as a Class D felony, and his sentence for Intimidation and Battery, as a Class A misdemeanor, following a bench trial. He raises two issues for review:

1. Whether the evidence is sufficient to support his conviction for Intimidation.

2. Whether the trial court erred when it imposed consecutive sentences despite his oral pronouncement of concurrent sentences for the offenses.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On June 11, 2008, Sexton visited his girlfriend, Courtney Spaulding, at her home. After the two began arguing, Sexton hit Spaulding on the head with his hand. Sexton then grabbed Spaulding by the back of the neck, and the two went outside with Spaulding's mother. Spaulding testified that, while the two were arguing outside, Sexton threatened to kill her if he went back to prison.[1] When police arrived, they arrested Sexton.

The State charged Sexton with intimidation, as a Class D felony; battery, as a Class D felony; and battery, as a Class A misdemeanor. Following a bench trial, the State dismissed the felony battery charge, and the court found Sexton guilty of intimidation and battery, as a Class A misdemeanor. At the sentencing hearing, the court stated as follows:

[1] In particular Spaulding testified that Sexton said ""if he goes back to prison he will kill me . . . ." Transcript at 13.

> I would sentence you on Count One, a Class D felony, Intimidation, to three years in the Department of Correction[]. Credit for the thirty-seven plus thirty-seven days that you have served. And to Count II, Battery as a Class A misdemeanor, I would sentence you to one year in the Department of Correction[], so the counts will run concurrent [with] each other. However, they are to run consecutive to 05202052, the case out of Court Five . . . .

Transcript at 41-42 (emphasis added). Sexton now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Sexton contends that the evidence is insufficient to support his conviction for Intimidation, as a Class D felony. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. See id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

The offense of intimidation, as a class D felony, is governed by Indiana Code Section 35-45-2-1. That statute provides, in relevant part, that "[a] person who communicates a threat to another person, with the intent . . . that the other person engage in conduct against the other person's will . . . commits intimidation, a Class A misdemeanor . . . . However, the offense is a . . . Class D felony if , . . the threat is to commit a forcible felony." Ind. Code § 35-45-2-1(a)(1), (b)(1).

In Crose v. State, 650 N.E.2d 1187 (Ind. Ct. App. 1995), trans. denied, Crose became enamored with a waitress in the Marion restaurant that he frequented. Crose began leaving love letters for the waitress. When the waitress became uncomfortable because of the letters, she began to refuse the letters and attempted to return them. The waitress eventually confided her unease with the situation to her manager, who barred Crose from the restaurant. Crose continued to send letters to the waitress by mail, and the manager marked those letters "return to sender." Crose also attempted to visit the restaurant several times after being barred, and on his last visit the manager called the police to escort Crose out of the restaurant. Following that incident, Crose phoned the restaurant and made the following statement to the manager: "Don't mess with me. Don't mess with mine. Or dust you will be and [the waitress] is mine . . . ." Id. at 1189.

Based on that statement, Crose was convicted of intimidation, as a Class A misdemeanor. On appeal, he argued that the evidence was insufficient to support his conviction. The court disagreed:

> Pursuant to I.C. 35-45-2-1(a), the alleged threat must have been made with the intent that [the manager] engage in conduct against her will, or that [the manager] be placed in fear of retaliation for a prior lawful act. Crose contends that the evidence does not support either conclusion.
>
> Crose is correct in his assertion that the jury returned a verdict of guilty for a Class A misdemeanor, which is a lesser included offense of the charge alleged in the information. He is also correct that the jury did not find that he communicated a threat to commit a forcible felony. However, his contention that the evidence does not support his conviction of intimidation as a Class A misdemeanor is incorrect. The evidence reveals that Crose communicated a threat to [the manager], with the intent that [the manager] engage in conduct against her will, to-wit: allow Crose into the restaurant. [The manager] testified at trial that Crose's threats put her in fear for her life. The State presented sufficient evidence to support every

> material element of intimidation, as a Class A misdemeanor, beyond a reasonable doubt.

Crose, 650 N.E.2d at 1192.

Here, the State charged that Sexton

> did communicate a threat to Courtney Spaulding, another person, said threat being: that he would kill and/or put a bullet in their [sic] head with the intent that said person engage in conduct against . . . her will, that is: not to call the police and further that said threat was to commit a forcible felony, to wit: murder.

Appellant's App. at 14. Thus, the State was required to prove beyond a reasonable doubt that Sexton communicated a threat to commit a forcible felony to Spaulding with the intent to cause Spaulding to engage in conduct against her will, namely, not to call the police.

We conclude that the State met its burden. After Sexton had hit Spaulding and led her outside by her neck, he communicated a threat when he threatened to kill her if he went back to prison. Murder is a forcible felony. See Griffith v. State, 898 N.E.2d 412, 418 (Ind. Ct. App. 2008). The evidence shows that Sexton communicated that threat with the intent that Spaulding engage in conduct against her will, namely, that she not call the police. There is sufficient evidence to support Sexton's conviction for intimidation, as a Class D felony.

Issue Two: Sentence

Sexton next contends that the "abstract of judgment imposed an erroneous sentence by ordering Counts 1 and 3 to be served consecutively." Appellant's Brief at 5. In particular, Sexton points out that the trial court, when orally pronouncing sentence, stated that the sentences for battery and intimidation were to be served concurrently. But

the abstract of judgment prepared by the court shows that the sentences are to be served consecutively. Thus, we must resolve the conflict between the court's oral and written sentencing statements.

When a conflict occurs between oral and written sentencing statements, the court on review has the "option of crediting the statement that accurately pronounces sentence or remanding for resentencing." Dowell v. State, 873 N.E.2d 59, 60 (Ind. 2007) (quoting McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007)). Here, at sentencing, the trial court stated in relevant part that "the counts will run concurrent [with] each other. However, they are to run consecutive to [49G05-0511-FC-202052.]" Transcript at 42. But the abstract of judgment states that Sexton's sentence for intimidation was to be served consecutive to the sentence for battery and to the sentence imposed in that other case.

We cannot discern from the record before us whether the court intended Sexton's sentences to be served consecutive to each other. The State concedes that "the record is not sufficient to resolve the trial court's intention" in this regard. Appellee's Brief at 7. Thus, we must remand for the court to resentence Sexton by clarifying whether his sentence for battery is to be served consecutive to his sentence for intimidation.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and KIRSCH, J., concur.